IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1977

No. 76-1743

JOHN LEONARD SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

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Suite 138
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Attorney for Petitioner

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

John Leonard Smith, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals Tenth Circuit entered in the above entitled case on March 30, 1977 and rulings on the Motions in the United States District Court of the Northern District of Oklahoma on August 20, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals Tenth Circuit is reported 76-1897, and is printed in Appendix A hereto, infra, page 17. The judgment of the United States District Court for the Northern District of Oklahoma is printed in Appendix A hereto, infra, page 35.

JURISDICTION

The judgment of the United States Court of Appeals Tenth Circuit (Appendix A, infra, page 17) was entered on March 30, 1977. The jurisdiction of the Supreme Court is invoked under:

1. Federal Rules Criminal Procedure, Rule 32(c) (2), 18 U.S.C.A.
2. 18 U.S.C.A. §3577.
3. Federal Rules Criminal Procedure, Rule 32(c) (1), 18 U.S.C.A.
4. Title 21, U.S.C. §841(a) (1).

QUESTIONS PRESENTED

1. To determine the necessity and contents of pre-sentence investigation reports in criminal proceedings to avoid any possibility of manifest injustice due to prejudicial and irrelevant information contained therein.

2. To determine the priorities of examination of said report by court counsel and defendant so as to delete therefrom such prejudicial and irrelevant information and/or inaccuracies.

3. To obtain an interpretative analyses of the 1975 Amendments to Rule 32 relating to pre-sentence investigation reports affecting unnecessary, irrelevant and inaccurate information contained therein.

4. Should information that the Court does not consider in its determination of imposition of sentence be included in a criminal pre-sentence investigation report?

STATUTE INVOLVED

Title 21 U.S.C. §841(a)(1).

STATEMENT OF CASE

On or about the 17th day of March, 1976, petitioner, John Leonard Smith, sold and distributed to one Steve Beck 1.7152 grams of cocaine, a Schedule II Narcotic Controlled Substance, in violation of Title 21 U.S.C. §841(a) (1), said Steve Beck being a member of the Drug Enforcement Administration. Petitioner entered a plea of guilty to said charge after being fully advised of his rights and fully questioned about his involvement and participation in the sale and being fully aware and cognizant of all proceedings and satisfied with representation and made said plea freely and voluntarily.

At that time, a pre-sentence investigation was ordered by the Court and pre-sentence investigation was completed prior to the date of sentencing.

Petitioner and his attorney, upon reading the pre-sentence investigation report, adivsed the Court that it contained errors and prejudicial information, and some arrest records which were prejudicial to petitioner's possibility of probation.

The petitioner then filed a "Motion to Arrest Judgment and Imposition of Sentence" which was overruled by the Court, and he is presently on bond pending this appeal.

The petitioner filed an appeal with the United States Court of Appeals Tenth Circuit which affirmed the trial court's decision on March 30, 1977.

REASONS FOR GRANTING WRIT

1. To determine the necessity and contents of pre-sentence investigation reports in criminal proceedings to avoid any possibility of manifest

injustice due to prejudicial and irrelevant information contained therein.

2. To determine the priorities of examination of said report by court counsel and defendant so as to delete therefrom such prejudicial and irrelevant information and/or inaccuracies.

3. To obtain an interpretative analyses of the 1975 Amendments to Rule 32 relating to pre-sentence investigation reports affecting unnecessary, irrelevant and inaccurate information contained therein.

4. Should information that the court does not consider in its determination of imposition of sentence be included in a criminal pre-sentence investigation report?

5. To clarify the guidelines for the submission of pre-sentence reports so as to avoid any prejudicial overtones of irrelevant and incompetent information.

Petitioner would point out that the policy behind the discretionary grant of certiorari is not so much whether the lower decision is erroneous but rather whether it merits the Supreme Court's attention and the appellate court, in its decision did not answer the question that is being presented in this Writ.

The Tenth Circuit in its published opinion of March 30, 1977, made the following observation, and I quote:

"Fed. Rules Cr. Proc. Rule 32(c)(2), 18 U.S.C.A., provides:

The report of the pre-sentence investigation shall contain <u>any prior criminal record</u> of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant,

and such other information as may be required by the court. (Underlining supplied.)

Further, we deem it most significant that the Congress not in anywise seen fit to repeal or amend 18 U.S.C.A. §3577, enacted in 1970 (Pub. L. 91-452, Title X, §1001(a), Oct. 15, 1970, 84 Stat. 95) which provides:

"No limitation shall be placed on the information concerning the backgrounds, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

After quoting the above the Tenth Circuit then interpreted that to mean that the trial court was entitled to all information concerning the defendant of every kind to assist as a guideline in the determination of the punishment. This general rule needs adequate clarification. If in fact the information is to be used as a guideline in the

determination of the type and extent of punishment, what purpose can irrelevant information (that the Court even acknowledges is not considered) possibly serve by being included other than to create the possibility of manifest injustice by the prejudicial nature of the information.

6. The defendant contended that such pre-sentence report should be examined by the defendant and defendant's counsel prior to the submission to the trial court to avoid irrelevant and inaccurate statements affecting the court's decision. The Tenth Circuit in response to this inquiry merely stated that the trial judge did not err in the handling in the pre-sentence and sentencing proceedings. The defendant did not contend that he did. The Tenth Circuit sets forth the present rule (Federal Rules Criminal Procedure Rule 32(c)(3)(a), 18 U.S.C.A.) permitting the

defendant and counsel to read the report and make any comments in regard to errors contained therein, and further related back prior to the 1975 Amendments where that permission was discretionary.

The trial court observed that the sentence would have been the same without the inaccuracies and the arrest record being included. If that is true, then such information can serve only one purpose and that purpose is obvious. The purpose of the pre-sentence report, as set forth in the Federal Rules of Criminal Procedure, is to assist the trial court in its determination and serve as a guideline in that determination. Therefore, if the information in that report is not for that purpose, it should not be included.

CONCLUSION

A first-offender, which is what this Appellant is, should receive all the consideration to which he is entitled in regard to suspended sentence, and/or probation and to incorporate an arrest record which is not considered by the Court, and I quote the Court from page 21 of the transcript, "I did not, I did not, consider that prior arrest recitation in any manner in arriving at the sentence the Court imposed, and I can further state if that had been left out, if it had not been included, if the report had been exactly as stated by the defendant and yourself prior to the sentencing, the sentence would have been exactly the same as the Court has heretofore pronounced."

Certainly a defendant with no arrest record of any kind would be given different consideration than a defendant with an arrest record and it is inconveivable that the Court would not distinguish

between two such defendants in a sentencing after conviction...

The "purpose of a pre-sentence report is to provide Court with information which may be helpful in imposing sentence or in granting probation or in correctional treatment of defendant." Warren v. Richardson, C.A. Nev. 1964, 333 F.2d 781

It is apparently the intention of such a report to guide and assist the Court in its determination, and information contained therein which the Court, by its own admission, does not consider, should not be included if it has the possibility of being prejudicial.

"Once the possibility of reliance on erroneous information...has been raised, an unexplained statement by the Court that it would have imposed the same sentence regardless of the original error is insufficient to dispel the lingering doubt that the sentence was founded upon illegitimate considerations." U.S. v. Rollerson, 491 F.2d 1974, 1209

In the case of U.S. v. Battaglia, 478 F.2d, 854 (1972), the Court made the following statement: "the judge had relied on pre-sentence report which contained alleged inaccuracies, judge stated that he would have imposed same sentence, even if facts were untrue, to assure defendant that alleged untrue facts would not affect the sentence, sentence would be vacated and defendant would be given opportunity at a hearing to refute inaccuracies and court should then reconsider sentence in light of true facts as found." (Emphasis added.)

The entire structure of the pre-sentence investigation report needs correcting for the reasons above stated. It is essential to the rights of the defendant that the court be given accurate, relevant information only so as not to affect the determination of the imposition of sentence. Once the information is before the Court the error is made and the harm is done.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenn Bradley

KENN BRADLEY

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Attorney for Petitioner

PROOF OF SERVICE

I hereby certify that I served three copies of the Petition for Writ of Certiorari and Appendices attached thereof to the United States District Attorney for the Northern District of the State of Oklahoma.

Kenn Bradley

KENN BRADLEY

Attorney for Petitioner

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1897

JOHN LEONARD SMITH,	)	Appeal from the United
	)	
Appellant,	)	States District Court
	)	
vs.	)	for the Northern Dist-
	)	
UNITED STATES OF AMERICA,	)	rict of Oklahoma
	)	
Appellee.	)	(D.C. No. 76-CR-84)

Submitted: February 14, 1977

Submitted on the briefs.

Kenn Bradley, Tulsa, Oklahoma, for Appellant.

Nathan G. Graham, United States Attorney, and Ben F. Baker, Assistant United States Attorney, for Appellant.

Before SETH, McWILLIAMS, and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

John Leonard Smith appeals from the trial Court's judgment and sentence following his guilty plea to an indictment charging that on or about March 17, 1976, he knowingly and intentionally distributed a Schedule II controlled substance (cocaine) in violation of 21 U.S.C.A. §841(a)(1). Smith had previously pled not guilty, but on the day set for his trial he changed the plea to guilty. The Court sentenced him to two and one-half years imprisonment, with eligibility of parole as provided in 18 U.S.C.A. §4208(b)(2), to be followed with a special parole term of four years following service of the sentence.

When Smith changed his plea on July 19, 1976, the trial Court conducted a full, complete and exemplary plea proceeding. Fed. R. Cr. Proc. Rule 11, 18 U.S.C.A.; McCarthy v. United States, 394 U.S. 459 (1969); Boykin v. Alabama, 395 U.S. 238 (1969). At the conclusion of the proceeding, the

Court accepted the plea of guilty and found Smith guilty as charged. The Court then referred Smith to the probation office for a probation pre-sentence report. The sentencing date was set for August 20, 1976. Smith was requested to cooperate with the probation office "...to see that anything that the Court should have is in that report so it can be understood and studied and appreciated before sentence...your counsel...will work with you, if you desire him to do so, with the probation office in the preparation of the pre-sentence report." [R., Vol. II, p. 18.]

On August 20, 1976, the defendant appeared in open Court with his counsel for the sentencing proceedings. The Court specifically addressed Smith and his counsel as to whether they had, respectively, the opportunity "to examine, review, read and study" the pre-sentence report. Both acknowledged that they had. [R., Vol. III, p.3.] When the Court inquired as to whether the pre-

sentence report was correct, Smith responded "Pretty much so, the best I can recall" and his counsel responded "Yes, Your Honor." [R., Vol. III, p. 3.] The Court then heard mitigating arguments as presented by Smith's counsel, who stated that he had known Smith for about eight or nine years and had represented Smith "previous to this, as is indicated by the pre-sentence investigation, in those matters that were dismissed and one was on acquittal." [R., Vol. III, p. 4.] When the Court inquired of Smith if he wished to say anything in his behalf in mitigation of punishment, Smith simply stated that he was then employed, enjoyed his work and would like to pursue the challenge of the job. [R., Vol. III, p. 4.] The Court then remarked about the seriousness of the offense and observed that Smith, in the instant case, was dealing in pretty big money in view of Smith's statement to a Government Agent (gleaned from the pre-sentence report) that Smith was

paying some $2,700.00 per ounce for pure cocaine. Thereupon, Smith stated to the Court that he did not make such a statement. He stated that he had simply stated that $2,700.00 per ounce was what pure cocaine would cost. When Smith's attorney inquired why Smith had not pointed out the "incorrect statement" aforesaid contained in the report, Smith stated that he had "just glanced over that paper, just before court." [R., Vol. III, p. 5.] The Court then stopped the proceedings and advised Smith to read the pre-sentence report "in depth and in detail." [R., Vol. III, p. 5.] After Smith had read the report carefully, the proceedings were reconvened. Counsel for Smith then advised the court that he did not make the remarks attributed to him in the report, and that the figure represented simply the prices Smith believed pure cocaine would sell for. In addition, counsel for Smith brought to the attention of the court two other matters related in the

report which he found to be incorrect. In both instances, Smith and his counsel advised the Court of that which Smith had said or attempted to convey in lieu of the language set forth in the report. In addition, Smith's counsel observed that he believed that the pre-sentence report "...is a little bit weighted against the defendant's personal life" which he proceeded to explain. [R., Vol. III, p. 10.]

The Court asked Smith several questions relative to matters contained in the report, during which Smith acknowledged that he had advised the Government's Special Agent (undercover) that he (Smith) could produce samples of cocaine and that he had four grams of cocaine on hand. Thereupon, the Court stated:

> "Well, the Court recognizes that in the preparation of reports that statements can be made and can be interpreted. The very reason that the Court asks that

the defendant and his counsel read completely and fully the report. ...

The Court accepts the statement(s) that the defendant makes and views the report in the light of those statements. But the Court is left with the full understanding that nonetheless there was a distribution by the defendant of hard narcotic cocaine. ...The use of it itself is bad enough, but the distribution of it is but an impetus to the use of it by all people. ..."

[R., Vol. III, pp. 12, 13.]

Soon after the court entered sentence, Smith filed a motion to arrest judgment and imposition of sentence, wherein he contended that "...the pre-sentence investigation report contained such sufficient inaccuracies as to the acts committed by the defendant and the circumstances surrounding the sale which, when accompanied therewith by the

arrest record also being included in the pre-sentence investigation destroyed the defendant's possibility of a probationary or suspended sentence and that without such inaccuracies the Court's determination as to sentence could have been altered and the term of sentence mitigated or suspended. [R., Vol. I, p. 7.] (Underlining supplied.) This motion was thereafter argued. Even though counsel for Smith recognized that the Court did not consider Smith's arrest record and the inaccuracies contained in the report, he still contended that if they had been "withdrawn or removed" that "the Court perhaps would have varied or changed its sentencing." [R., Vol. III, p. 18.] The Court carefully reveiwed all of the matters relating to the report and concluded, in denying the motion, "...that the very items you now raise in your motions were fully and completely explained and discussed prior to any sentence being pronounced." [R.,Vol.III, p.20.]

On appeal, Smith raises two contentions in support of his motion to set aside the judgment: (1) that the pre-sentence investigation report contained history of previous arrests which was prejudicial to the extent that it constituted manifest injustice for it to be included, and (2) that the pre-sentence investigation report should be submitted to the defendant and his attorney prior to the reading of same by the Court so that errors and misstatements can be corrected or deleted so as not to leave any doubt about its influencing the Court's decision.

Smith's brief on appeal frankly acknowledges that "the case law is in direct opposition to defendant's position and he can present this Court with no absolute authority to support it other than a realistic practical one." [Brief of Appellant, p. 9.]

I.

Smith contends that because the pre-sentence report contained history of previous arrests,

same was prejudicial to the extent that it constituted manifest injustice to have been included. The contention is without merit.

Fed. Rules Cr. Proc. Rule 32(c)(2), 18 U.S.C.A.,provides:

> The report of the pre-sentence investigation shall contain <u>any prior criminal record</u> of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court. (Underlining supplied.)

Further, we deem it most significant that the Congress has not in anywise seen fit to repeal or amend 18 U.S.C.A. §3577, enacted in 1970 [Pub. L.

91-452, Title X, §1001(a), Oct. 15, 1970, 84 Stat. 95] which provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a Court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

The above statute was interpreted by the Supreme Court in United States v. Tucker, 404 U.S. 443 (1972). The Court held that as a general rule, a Federal district judge may, before sentencing, "...conduct an inquiry broad in scope, largely unlimited either as to kind of information he may consider, or the source from which it may come." 404 U.S. at 446. The Court did, of course, recognize one well-defined limitation to the rule, i.e., use or consideration of convictions obtained when the defendant was not afforded the

benefit of counsel. On the other hand, this statute was enacted in order to clearly authorize the trial judge to rely upon information of alleged criminal activity for which the defendant had not been prosecuted, which was justification for the broad scope of inquiry now authorized under §3577, supra:

> ....A sentencing judge....is not confined to the narrow issue of guilt. His task within statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics... 337 U.S., at 247

II.

Smith contends that the pre-sentence investigation report should be submitted to the defendant and his attorney prior to the reading of same by the Court so as not to leave any doubt about its influencing the Court's decision. We hold that the trial judge did not err in his handling of the pre-sentence and sentencing proceedings.

Fed. Rules Cr. Proc. 32(c)(3)(A), 18 U.S.C.A., provides that before imposing sentence the court shall, upon request, permit the defendant, or his counsel if he is so represented, to read the report exclusive of any recommendation as to sentence or matters involving diagnostic opinions, confidential information, or other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. Significantly, this proviso also directs the Court to "...afford the defendant or his

counsel an opportunity to comment thereon and, at the discretion of the Court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the pre-sentence report."

We first observe that prior to the 1975 Amendment, we held that it was permissive on the part of the trial Court to determine whether to disclose the contents of a pre-sentence report to the defendant. United States v. Gardner, 480 F.2d 929 (Tenth Circuit 1973); cert. denied, 414 U.S. 977 (1973); United States v. Stidham, 459 F.2d 297 (Tenth Circuit 1972), cert. denied, 409 U.S. 868 (1972). Since the 1975 Amendment, the procedure employed by the district Court in the instant case is mandated. As amended in 1975, Rule 32, supra, requires a pre-sentence report unless, with the permission of the Court, the defendant waives the pre-sentence investigation, or the Court finds that there is in the record information sufficient

to enable a meaningful exercise of sentencing discretion, and this finding is contained in the record. Fed. Rules Cr. Proc. Rule 32(c)(1), 18 U.S.C.A.

It is most relevant that we consider the legislative history behing the 1975 Amendments. In Gregg v. United States, 394 U.S. 489 (1969), rehearing denied, 395 U.S. 917 (1969), the Court held that there was no requirement for disclosure of the pre-sentence report to the defendant.. Commencing in 1944, the Advisory Committee recommended disclosure to the defendant. See: Wright, Federal Practice and Procedure, Criminal 524; 8A Moore's Federal Practice - Criminal Rules 32.02[4]. The purpose behind the adoption of the 1975 Amendments is stated by the Advisory Committee as follows:

> The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also

> to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the Court information thought by the defense to be inaccurate, incomplete, or otherwise misleading. Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete pre-sentence reports or the argument that sentencing procedures will become unnecessarily protracted. It is not intended that the probation officer would be subjected to any rigorous examination by defense counsel, or that he will even be sworn to testify. The proceedings may be very informal in nature unless the Court orders a full hearing.
>
> 62 F.R.D., at 325.

We hold that the trial court in the instant case meticulously and carefully abided with each, all and every command contained in the aforesaid 1975 Amendments.

Smith was accorded all statutory and/or rule-made rights and consideration. It is difficult to believe that more could have been done to protect one convicted from suffering a sentence imposed based upon false or incorrect pre-sentence information relied upon by the Court.

WE AFFIRM.

JUDGMENT

AND

PROBATION/COMMITMENT ORDER

UNITED STATES DISTRICT COURT

For The

NORTHERN DISTRICT OF OKLAHOMA

Docket No. 76-CR-84

UNITED STATES OF AMERICA,

Plaintiff

versus

JOHN LEONARD SMITH,

Defendant

Before

H. Dale Cook

United States District Judge

In the presence of the attorney for the government the defendant appeared in person on this date, August 20, 1976, with counsel, Kenn Bradley, retained, and entered a plea of guilty, and the Court being satisfied that there is a factual basis for the plea, there being a finding of guilty.

Defendant has been convicted as charged of the offense of having violated T. 21, U.S.C., Section 841(a)(1), as charged in the Indictment.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two and one-half (2-1/2) years.

IT IS FURTHER ORDERED that the defendant may become eligible for parole at such time as the

U.S. Parole Commission may determine as provided in T. 18, U.S.C.A., Section 4205(b)(2).

IT IS FURTHER ORDERED that the defendant is sentenced to a special parole term of four (4) years, to commence at the expiration of the sentence imposed herein.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ H. Dale Cook

August 20, 1976